

Chapter Fifteen

WARRANTS

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WARRANTS

AUTHORITY

Section 9(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, authorizes officers or employees, who have been duly designated by the Administrator, to obtain and execute warrants authorizing the following:

- < Entry for the purposes of sections 8 and 9.
- < Inspection and reproduction of all records showing the quantity, date of shipment, and names of the consignor and consignee of any pesticide or device found in violation of FIFRA at any establishment and, in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the pesticide or device.
- < Seizure of any pesticide or device that is in violation of FIFRA.

OBJECTIVE

To gain entry where lawful entry has been denied for the purpose of conducting establishment inspections, books and records inspections, and use/misuse inspections.

POLICY

In General

It is the policy of EPA to obtain a warrant only when all other efforts to gain lawful entry as authorized under sections 8(b) (inspection of books and records) and 9(a) (inspection of establishments) have been denied. Therefore, the inspector must be confident that the denial of entry was not the result of his/her failure to present proper identification, to present a notice of inspection, or to explain the purpose of the inspection.

If denial of entry occurs because of one of these reasons, the

inspector must correct the problem and again request entry. If entry is still denied, contact the Regional office to discuss the feasibility of obtaining a warrant.

Before contacting the Regional office, however, the inspector must prepare detailed notes giving the name of the person approached, his/her title, time of denial, reason for denial (if given), and reason for inspection (i.e., “probable cause” or “neutral administrative inspection scheme”). This information will be essential when endeavoring to obtain the warrant.

Note that refusal of entry is not a prerequisite to obtaining a warrant. A pre-inspection warrant may be obtained where surprise is desired, the company has a history of prior refusal, or the distance to a U.S. attorney or a magistrate is so considerable that excessive travel time would be required if entry were denied.

Impact of Barlow's Decision on Conduct of FIFRA Inspections

The Supreme Court decision in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) affects most government inspections, including any inspections conducted by State personnel or contractors. In *Barlow's*, the Supreme Court held that an OSHA (Occupational Safety and Health Administration) inspector was not entitled to enter the nonpublic portions of a work site without either the owner's consent or a warrant.

The decision protects the owner against any penalty or other punishment that may arise as a result of his/her insistence upon a warrant. It also prohibits EPA from imposing sanctions on owners who insist on a warrant before allowing inspections of the nonpublic portions of the establishment.

Note that the *Barlow's* restrictions do not apply to (1) emergency situations or (2) the inspector's observations of things that are in “plain view” (i.e., those things that anyone would be in position to observe).

There are some grounds for interpreting *Barlow's* as not applying to FIFRA inspections. For instance, the *Barlow's* restrictions do not apply to areas that have been subject to a long-standing and pervasive history of government regulation – this could include pesticide establishments. It is Agency policy, however, that FIFRA inspections must be conducted under the same requirements applicable to other enforcement programs, including the *Barlow's* restrictions.

The Agency has published detailed guidance on the “The Conduct of Inspections After the *Barlow's* Decision” (GM-5) (see Exhibit 15-1.).

PROCEDURES

Obtaining the Warrant

The inspector plays a significant role in seeking a warrant. His or her knowledge and experience relating to the incident are crucial to the drafting of warrant documents. Inspectors are responsible for: (1) obtaining information that specifically describes the premises that are to be searched; (2) providing specific information with regard to the items to be seized; and (3) helping to determine which laws apply or may have been violated.

The inspector also provides the information amounting to reasonable cause, or supplies the predetermined inspection schedule that brought him/her to the site.

Regarding all of these items, the inspector should help “cast a wide net,” but one that still is legitimately founded in the facts and the applicable law. Drafting warrant documents is a particularly important area where attorneys and inspectors must work as a team.

Contact the U.S. Attorney

After a decision has been made to obtain a search warrant, the Regional office will determine whether the inspector, his/her supervisor, or the Regional attorney must contact the U.S. attorney of the district in which the property is located. The Regional office must assist the U.S. attorney in preparing the warrant and any necessary affidavits. Frequently, the Regional office will prepare these documents for the U.S. Attorney in advance of meeting with him/her or the Assistant U.S. Attorney.

Requirements for Obtaining a Warrant

When obtaining a warrant, three documents must be drafted: (1) an application for a warrant; (2) affidavit in support; and (3) the warrant itself. Each document must be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document. Exhibit 15-2 is an example of an affidavit that can be used to support an application for a warrant. Exhibit 15-3 is an example of a warrant that may be prepared for the magistrate's signature.

The application for a warrant must identify the statute (FIFRA) and regulations under which the Agency is seeking the warrant, and identify clearly the site or establishment to be inspected (including, if possible, the owner and/or operator of the site). The application must be signed by the U.S. Attorney or Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial. Each affidavit must consist of consecutively numbered paragraphs describing all of the facts that support the issuance of the warrant (probable cause). If the warrant is sought in the absence of probable cause, the warrant must recite or incorporate by reference the neutral administrative scheme that is the basis for inspecting the

particular establishment. Each affidavit must be signed by someone with personal knowledge of all the facts stated, although that person can rely upon “hearsay” or secondhand knowledge. In a case where entry has been denied, this person would most likely be the inspector who has been denied entry. Note that an affidavit is a sworn statement that must either be notarized or personally sworn to before the magistrate.

The warrant itself is a direction to an appropriate official (an EPA inspector, U.S. Marshal, or other federal officer) to enter a specifically described location and perform specifically described inspection functions. Because the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any sample to be taken, any articles to be seized, etc. Note, however, that a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge.

The draft warrant must be ready for the magistrate's signature at the time of submission. Once the magistrate signs the draft warrant, it is an enforceable document.

Either following the magistrate's signature or on a separate page, the draft warrant must contain a “return,” which is used to report that the warrant was executed. The return is to be signed and dated by the inspector after completing the inspection (see “Returning the Warrant” below).

Executing the Warrant

Warrants are executed only by a physical entry onto the premises. It is customary to show a possessor a copy of the warrant or provide a copy, but it is not necessary to serve a warrant. Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the facility to begin or continue the inspection. If more than one person will be conducting the inspection, it is important that the inspection team members determine each member's role (i.e., who is going to do what and when) before going to the facility. The warrant must be executed without undue delay. The warrant will usually direct that it be executed during daylight hours and specify the date by which it must be executed.

Denial of Entry

Where there is high probability that entry will be refused even with a warrant, or there exists a likelihood of threats of violence, the inspector must be accompanied by a U.S. Marshal, County Sheriff or local police department officer when executing the warrant. For reasons of personal safety, the inspector must not attempt forcible entry of the facility at his/her own initiative.

If the facility representative refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector must leave and so inform the Assistant U.S. Attorney and the designated Regional Attorney. They will take appropriate action, such as: (1) sending the inspector back to the facility, accompanied by a U.S. Marshal; or (2) seeking a citation for contempt.

Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. If a refusal or threat to refuse occurs, the inspector must abide by the Marshal's decision whether to leave, seek forcible entry, or take other action.

Inspecting With a Warrant

Except as described below, the inspector must conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to follow all procedures carefully, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must provide a receipt for the property taken and maintain an inventory. This inventory will be examined by the magistrate as part of the return to ensure that the warrant's authority has not been exceeded and will become an exhibit to the original warrant when returned to the magistrate or his/her clerk.

Inspectors must keep the following points in mind when conducting an inspection pursuant to a warrant:

- < As long as the inspection procedures authorized in the warrant are followed, evidence gathered that may be beyond the scope of the warrant generally will not affect the validity of the warrant or of other evidence within the warrant's scope. The court and the attorneys will decide later whether a particular piece of evidence must be returned as improperly taken.
- < Pay particular attention to obtaining evidence regarding authorship, possession, and distribution of facility documents.
- < Be aware of other possible evidence of wrongdoing. Such evidence generally is obtainable as long as the inspector has the lawful authority to be where he/she is. Apply the "plain view" doctrine, which means essentially that if a piece of evidence is where it can be seen by anyone in lawful position or place to do so, it can be collected.
- < The language of the warrant will specify the limits of the warrant with respect to split samples and provision of certain documents to the site possessor.
- < As with all inspections, interview as many individuals as possible. There are no restrictions on asking questions, although there is no obligation for the facility's representatives or employees to respond.

- < The Agency interprets FIFRA as authorizing EPA to physically remove documents from the establishment and carry them away, and the magistrate must specifically authorize removal in the warrant. If for some reason, removal is not possible or authorized in the warrant, make provision for copying or photographing the documents on site or, if necessary, dictate their contents into a machine. If destruction of the documents by the owner/operator is a real concern, the documents must be seized if they are essential to the investigation, regardless of any questions regarding the scope of the warrant. In such a case, it is better to run the risk of having the court rule that the documents must be returned to the possessor than it is to suffer their certain loss.

Returning the Warrant

The return made on a warrant is a written report informing the court when and where the warrant was executed, who participated, generally what was done, what items were collected from the premises (if any), and whether a copy of the warrant was given to someone (listing the person's name and address).

A return on a warrant is not a certificate or affidavit affirming that the warrant was “served” on someone. “Service” of a copy of a warrant is not a requirement to the valid “execution” of the warrant and is not part of the execution as such.

After the inspection has been completed, the warrant must be returned to the magistrate. A return of the warrant within the time restrictions required by the court is essential, because failure to do so could result in contempt action against the executing officials.

The person who executes the warrant (i.e., the person who performs the inspection) must sign the return form and give it and the warrant to the U.S. Attorney, who will formally send the documents to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be included in the return, and the inspector must be present to certify that the inventory is accurate and complete.

Challenges to the Warrant

The possibility always exists that a facility representative will challenge a warrant and the evidence obtained. The warrant and all evidence gathered pursuant to it, or portions of evidence obtained in an otherwise valid warrant, can be overturned by the court. Some of the typical bases for challenges to a warrant or evidence (whether or not they are successful) include the following:

- < Insufficient cause for issuance of the warrant.
- < Insufficient affidavit supporting the warrant.
- < Inaccurate information in the supporting affidavit.
- < Insufficient description of the premises or items to be seized.

- < Searches beyond the scope of the warrant.
- < Failure to follow appropriate procedures for serving or returning the warrant.

For a warrant of evidence obtained under it to be successfully challenged, in whole or in part, usually someone must make a prejudicial mistake at some point in the warrant process. If the mistake is serious enough, an entire case could be lost.

There is no reason, however, why this should occur in any case. The procedures for obtaining, executing, and returning a warrant are generally well defined and established. Follow them as closely as possible to ensure successful inspection.

Exhibit 15-1: Conduct of Inspections After the Barlow's Decision

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
11 APR 1978

MEMORANDUM

OFFICE OF ENFORCEMENT

TO: Regional Administrators
Surveillance and Analysis Division Directors
Enforcement Division Directors

FROM: Assistant Administrator for Enforcement

SUBJECT: Conduct of Inspections After the Barlow's Decision

I. Summary

This document is intended to provide guidance to the Regions in the conduct of inspections in light of the recent Supreme Court decision in Marshall v. Barlow's, Inc., ___ U.S. ___, 98 S. Ct. 1816 (1978). The decision bears upon the need to obtain warrants or other process for inspections pursuant to EPA-administered Acts.

In Barlow's, the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant.

In summary, Barlow's should only have a limited effect on EPA enforcement inspections:

- Inspections will generally continue as usual;
- Where an inspector is refused entry, EPA will seek a warrant through the U.S. Attorney;
- Sanctions will not be imposed upon owners of establishments who insist on a warrant before allowing inspections of the non-public portions of an establishment.

The scope of the Barlow's decision is broad. It affects all current inspection programs of EPA, including inspections conducted by State personnel and by contractors. The Agency's procedures for inspections, particularly where entry is denied, were largely in accord with the provisions of Barlow's before the Supreme Court issued its ruling. Nevertheless, a number of

changes in Agency procedure are warranted. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this document.

This document focuses on the preparation for and conduct of inspections, including (1) how to proceed when entry is denied, (2) under what circumstances a warrant is necessary, and (3) what showing is necessary to obtain a warrant.

II. Conduct of Inspections

The following material examines the procedural aspects of conducting inspections under EPA-administered Acts. Inspections are considered in three stages: (1) preparation for inspection of premises, (2) entry onto premises, and (3) procedures to be followed where entry is refused.

A. Preparation

Adequate preparation should include consideration of the following factors concerning the general nature of warrants and the role of personnel conducting inspections.

(1) Seeking a Warrant Before Inspection

The Barlow's decision recognized that, on occasion, the Agency may wish to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. Such a warrant may be necessary when surprise is particularly crucial to the inspection, or when a company's prior bad conduct and prior refusals make it likely that warrantless entry will be refused. Pre-inspection warrants may also be obtained where the distance to a U.S. Attorney or a magistrate is considerable so that excessive travel time would not be wasted if entry were denied. At present, the seeking of such a warrant prior to an initial inspection should be an exceptional circumstance, and should be cleared through Headquarters. If refusals to allow entry without a warrant increase, such warrants may be sought more frequently. (For specific instructions on how to obtain a warrant, see Part D.)

(2) Administrative Inspections v. Criminal Investigations

It is particularly important for both inspectors and attorneys to be aware of the extent to which evidence sought in a civil inspection can be used in a criminal matter, and to know when it is necessary to secure a criminal rather than a civil search warrant. There are three basic rules to remember in this regard: (1) If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, an administrative inspection (civil) warrant may be used; (2) if the inspection is in fact intended, in whole or in part, to gather evidence for a possible criminal prosecution, a criminal search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; and (3) evidence obtained during a valid civil inspection is generally admissible in criminal proceedings. These principles arise from the recent Supreme Court cases of Marshall v. Barlow's, Inc., supra; Michigan v. Tyler, ___ U.S. ___, 98 S. Ct. 1942 (1978); and U.S. v. LaSalle

National Bank, ___U.S.___, 57 L. Ed. 2d 221 (1978). It is not completely clear whether a combined investigation for civil and criminal violations may be properly conducted under a civil of “administrative” warrant, but we believe that a civil warrant can properly be used unless the intention is clearly to conduct a criminal investigation.

(3) The Use of Contractors to Conduct Inspections

Several programs utilize private contractors to aid in the conduct of inspections. Since, for the purpose of inspections, these contractors are agents of the Federal government, the restrictions of the Barlow’s decision also apply to them. If contractors are to be conducting inspections without the presence of actual EPA inspectors, these contractors should be given training in how to conduct themselves when entry is refused. With respect to obtaining or executing a warrant, an EPA inspector should always participate in the process, even if he was not at the inspection where entry was refused.

(4) Inspections Conducted by State Personnel

The Barlow’s holding applies to inspections conducted by State personnel and to joint Federal/State inspections. Because some EPA programs are largely implemented through the States, it is essential that the Regions assure that State-conducted inspections are conducted in compliance with the Barlow’s decision, and encourage the State inspectors to consult with their legal advisors when there is a refusal to allow entry for inspection purposes. State personnel should be encouraged to contact the EPA Regional Enforcement Office when any questions concerning compliance with Barlow’s arise.

With regard to specific procedures for States to follow, the important points to remember are: (1) The State should not seek forcible entry without a warrant or penalize an owner for insisting upon a warrant, and (2) the State legal system should provide a mechanism for issuance of civil administrative inspection warrants. If a State is enforcing an EPA program through a State statute, the warrant process should be conducted through the State judicial system. Where a State inspector is acting as a contractor to the Agency, any refusal to allow entry should be handled as would a refusal to an Agency inspector as described in section II.B.3. Where a State inspector is acting as a State employee with both Federal and State credentials, he should utilize State procedures unless the Federal warrant procedures are more advantageous, in which case, the warrant should be sought under the general procedures described below. The Regions should also assure that all States which enforce EPA programs report any denials of entry to the appropriate Headquarters Enforcement Attorney for the reasons discussed in section II.B.4.

B. Entry

(1) Consensual Entry

One of the assumptions underlying the Court’s decision is that most inspections will be consensual and that the administrative inspection framework will thus not be severely

disrupted. Consequently, inspections will normally continue as before the Barlow's decision was issued. This means that the inspector will not normally secure a warrant before undertaking an inspection but, in an attempt to gain admittance, will present his credential and issue a notice of inspection where required. The establishment owner may complain about allowing an inspector to enter or otherwise express his displeasure with EPA or the Federal government. However, as long as he allows the inspector to enter, the entry is voluntary and consensual unless the inspector is expressly told to leave the premises. On the other hand, if the inspector has gained entry in a coercive manner (either in a verbal or physical sense), the entry would not be consensual.

Consent must be given by the owner of the premises or the person in charge of the premises at the time of the inspection. In the absence of the owner, the inspector should make a good faith effort to determine who is in charge of the establishment and present his credentials to that person. Consent is generally needed only to inspect non-public portions of an establishment - i.e., any evidence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

(2) Withdrawal of Consent

The owner may withdraw his consent to the inspection at any time. The inspection is valid to the extent to which it has progressed before consent was withdrawn. Thus, observations by the inspector, including samples and photographs obtained before consent was withdrawn, would be admissible in any subsequent enforcement action. Withdrawal of consent is tantamount to a refusal to allow entry and should be treated as discussed in section II.B.3. below, unless the inspection had progressed far enough to accomplish its purposes.

(3) When Entry is Refused

Barlow's clearly establishes that the owner does have the right to ask for a warrant under normal circumstances.¹ Therefore, refusal to allow entry for inspectional purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of a warrant and one of the exemptions discussed in Part C does not apply. If the owner were to allow the inspector to enter his establishment only in response to a threat of enforcement liability, it is quite possible that any evidence obtained in such an inspection would be inadmissible. An inspector may, however, inform the owner who refuses entry that he intends to seek a warrant to compel the inspection. In any event, when entry is refused, the inspector should leave the premises immediately and telephone the designated Regional Enforcement Attorney as soon as possible for further instructions. The Regional Enforcement Attorney should contact the U.S. Attorney's Office for the district in which the establishment desired to be inspected is located and explain to the appropriate Assistant United States Attorney the need for a warrant to conduct the particular inspection. The Regional Attorney should arrange for

¹FIFRA inspections are arguably not subject to this aspect of Barlow's. See discussion, p. 5 and 6.

the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided in the appendix to this document.

(4) Headquarters Notification

It is essential that the Regions keep Headquarters informed of all refusals to allow entry. The Regional Attorney should inform the appropriate Headquarters Enforcement Attorney of any refusals to enter and should send a copy of all papers filed to Headquarters. It is necessary for Headquarters to monitor refusals and Regional success in obtaining warrants to evaluate the need for improved procedures and to assess the impact of Barlow's on our compliance monitoring programs.

C. Areas Where a Right of Warrantless Entry Still Exist

(1) Emergency Situations

In an emergency, where there is no time to get a warrant, a warrantless inspection is permissible. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Supreme Court states that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations". Nothing stated in Barlow's indicates any intention by the court to retreat from this position. The Regions will always have to exercise considerable judgement concerning whether to secure a warrant when dealing with an emergency situation. However, if entry is refused during an emergency, the Agency would need the assistance of the U.S. Marshal to gain entry, and a warrant could probably be obtained during the time necessary to secure that Marshal's assistance.

An emergency situation would include potential imminent hazard situations, as well as, situations where there is potential for destruction of evidence or where evidence of a suspected violation may disappear during the time that a warrant is being obtained.

(2) FIFRA Inspections

There are some grounds for interpreting Barlow's as not being applicable to FIFRA inspections. The Barlow's restrictions do not apply to areas that have been subject to a long standing and pervasive history of government regulation. An Agency administrative law judge held recently that even after the Barlow's decision, refusal to allow a warrantless inspection of a FIFRA regulated establishment properly subjected the owner to a civil penalty. N. Jones & Co., Inc., I.F. & R Docket No. III-121C (July 27, 1978). For the present, however, FIFRA inspections should be conducted under the same requirements applicable to other enforcement programs.

(3) “Open Fields” and “In Plain View” Situations

Observations by inspectors of things that are in plain view, (i.e., of things that a member of the public could be in a position to observe) does not require a warrant. Thus, an inspector’s observations from the public area of a plant or even from certain private property not closed to the public are admissible. Observations made even before presentation of credentials while on private property which is not normally closed to the public are admissible.

D. Securing a Warrant

There are several general rules for securing warrants. Three documents have to be drafted: (a) an application for a warrant, (b) an accompanying affidavit, and (c) the warrant itself. Each document should be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document.

The application for a warrant should generally identify the statutes and regulations under which the Agency is seeking the warrant, and should clearly identify the site or establishment desired to be inspected (including, if possible, the owner and/or operator of the site). The application can be a one or two page document if all of the factual background for seeking the warrant is stated in the affidavit, and the application so states. The application should be signed by the U.S. Attorney or by his Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial document. Each affidavit should consist of consecutively numbered paragraphs, which describe all of the facts that support warrant issuance. If the warrant is sought in the absence of probable cause, it should recite or incorporate the neutral administrative scheme which is the basis for inspecting the particular establishment. Each affidavit should be signed by someone with personal knowledge of all the facts stated. In cases where entry has been denied, this person would most likely be the inspector who was denied entry. Note that an affidavit is a sworn statement that must either be notarized or personally sworn to before the magistrate.

The warrant is a directions to an appropriate official (an EPA inspector, U.S. Marshal or other Federal officer) to enter a specifically described location and perform specifically described inspection functions. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, any articles to be seized, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge. The draft warrant should be ready for the magistrate’s signature at the time of submission via a motion to quash and suppress evidence in Federal District court. Once the magistrate signs the draft warrant, it is an enforceable document. Either following the magistrate’s signature or on a separate page, the draft warrant should contain a “return of service” or “certificate of service”. This portion of the warrant should indicate upon whom the warrant was personally served and should be signed and dated by the inspector. As they are

developed, more specific warrant-issuance documents will be drafted and submitted to the Regions.

E. Standards or Bases for the Issuance of Administrative Warrants

The Barlow's decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of traditional criminal probable cause, 2) of civil probable cause, or 3) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme.

1. Civil specific probable cause warrant.

Where there is some specific probable cause for issuance of a warrant, such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the U.S. Attorney in detail the basis for this probable cause.

The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.

2. Civil probable cause based on a neutral administrative inspection scheme.

Where there is no specific reason to think that a violation has been committed, a warrant may still be issued if the Agency can show that the establishment is being inspected pursuant to a neutral administrative scheme. As the Supreme Court stated in Barlow's:

"Probable cause in the criminal law sense is not required. For the purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]. A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various type of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employers Fourth Amendment rights."

Every program enforced by the Agency has such a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. Also, a scheme in which one out of every three known PCB transformer repair shops is inspected on an annual basis is satisfactory, as long as, neutral criteria such as random selection are used to select the

individual establishment to be inspected. Headquarters will prepare and transmit to the Regions the particular neutral administrative scheme under which each program's inspections are to be conducted. Inspections not based on specific probable cause must be based on neutral administrative schemes for a warrant to be issued. Examples of two neutral administrative schemes are provided in the appendix. (Attachments II and III)

The Assistant U.S. Attorney will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The Assistant U.S. Attorney will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or Federal district court judge.²

3. Criminal Warrants.

Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector and the Regional Attorney should request that the U.S. Attorney seek a criminal warrant under Rule 41 of the Federal Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered. Agency policy on the seeking of criminal warrants has not been affected by Barlow's. The distinction between administrative inspections and criminal warrant situations is discussed in Section II.A.2.

²The Barlow's decision states that imposing the warrant requirement on OSHA would not invalidate warrantless search provisions in other regulatory statutes since many such statutes already "envision resort to Federal court enforcement when entry is refused". There is thus some question as to whether the existence of a non-warrant Federal court enforcement mechanism in a statute requires the use of that mechanism rather than warrant issuance. We believe that the Barlow's decision gives the agency the choice of whether to proceed through warrant issuance or through an application for an injunction, since the decision is largely based on the fact that a warrant procedure imposes virtually no burden on the inspecting agency. In addition, an agency could attempt to secure a warrant prior to inspection on an ex parte basis, something not available under normal injunction proceedings. Several of the acts enforced by EPA have provisions allowing the Administrator to seek injunctive relief to assure compliance with the various parts of a particular statute. There may be instances where it would be more appropriate to seek injunctive relief to gain entry to a facility than to attempt to secure a warrant for inspection, although at this point we cannot think of any. However, since the warrant process will be far more expeditious than the seeking of an injunction, any decision to seek such an injunction for inspection purposes should be cleared through appropriate Headquarters staff.

F. Inspecting with a Warrant

Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal where he goes to serve the warrant on the recalcitrant owner. The inspector should never himself attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the Assistant to U.S. Attorney and the designated Regional Attorney. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. Thus, if a refusal or threat to refuse occurs, the inspector should abide by the U.S. Marshal's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

G. Returning the Warrant

After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant, (i.e., whoever performs the inspection), must sign the return of service form indicating to whom the warrant was served and the date of service. He should then return the executed warrant to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

III. Conclusion

Except for requiring the Agency to formalize its neutral inspection schemes, and for generally ending the Agency's authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections, Barlow's should not interfere with EPA enforcement inspections.

Where there is doubt as to how to proceed in any entry case, do not hesitate to call the respective Headquarters program contact for assistance.

Marvin B. Durning

Exhibit 15-2: Model Affidavit in Support of Application for a Warrant

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

Docket No.

Case No.

In the matter of:

State of _____:

County of _____:

Affidavit in Support of
Application for a Warrant_____, being duly sworn upon his oath, according to law,
deposes and says:

1. I am duly authorized ____ (title) ____ of the ____ (division) ____, United States Environmental Protection Agency, Region _____. I hereby apply for a warrant pursuant to Section 9 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. Section 136 et seq., for the inspection and/or sampling of the items named below in the possession, custody or control of the (name of company or owner).
2. This warrant is sought under Section 9 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (7 U.S.C. Section 136g), which provides:
 - “(b) WARRANTS - For purposes of enforcing the provisions of this Act and upon a showing to an officer of court of competent jurisdiction that there is reason to believe that the provisions of this Act have been violated, officers or employees duly designated by the Administrator are empowered to obtain and to execute warrants authorizing -
 - “(1) entry for the purpose of this section;
 - “(2) inspection and reproduction of all records showing the quantity, date of shipment, and the name of consignor and consignee of any pesticide or device found in the establishment which is adulterated, misbranded, not

registered (in the case of a pesticide) or otherwise in violation of this Act and in the event of the inability of any person to produce records containing such information, all other records and information relating to such delivery, movement, or holding of the pesticide or device; and

3. (Name of establishment, person, or place) is a (describe its business) which the undersigned compliance officer of the United States Environmental Protection Agency has reason to believe is in violation of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. This belief is based upon the following facts and information: (summarize the reasons why a violation is suspected and the facts justifying the suspicions).
4. The (inspection, reproduction of records, sampling, issuance of the stop sale, use or removal order) will be carried out with reasonable promptness, and a copy of the results of analyses performed on any samples or material collected will be furnished to the owner or operator of the subject establishment or property.
5. The compliance officer may be accompanied by one or more other compliance officers of the United States Environmental Protection Agency.
6. The undersigned compliance officer requests immediate entry to (Name of establishment or place) to perform the inspection, reproduction of records, sampling, or the issuance of a stop sale, use or removal order [optional, if necessary].
7. A return will be made to the court at the completion of the inspection, reproduction of records, sampling, or issuance of a stop sale, use or removal order.
8. The authority of the issuance of the inspection warrant is Section 9 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967), and Marshall v. Barlow's Inc., 436 U.S. 307 (1978).

(Name of Compliance Officer)

A Notary Public of _____

My Commission expires _____

Exhibit 15-3: Model Warrant

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

In the matter of: Docket No. _____
 Case No. _____

Warrant for Inspection, Reproduction of Records, Sampling, and Issuing
 Stop Sale, Use or Removal Order of Pesticides or Devices Pursuant to the
 Federal Insecticide, Fungicide, and Rodenticide Act, as amended, (7
 U.S.C. Section 136).

To _____ (Name) _____, _____ (Title) _____, _____ (Division) _____, Environmental Protection
 Agency, Region _____, and any other duly authorized enforcement officer of said division:

Application having been made and probable cause shown, by (Name of Officer), for inspection
 and sampling of packaged, labeled, and released pesticides or devices, as well as labeling and
 containers found in the establishment described below; and for inspection and reproduction of
 records showing quantity, date of shipment, and the name of consignor and consignee of any
 pesticide or device found in said establishment which is adulterated, misbranded, not
 registered in the case of a pesticide or otherwise in violation of the Federal Insecticide,
 Fungicide, and Rodenticide Act, as amended, or should such records not be available for
 inspection, all other available records and information relating to such delivery, movement, or
 holding of any pesticide or device which is in violation of the said Act; for the issuance or
 surveillance of any stop sale, use or removal order of any pesticide or device which is in
 violation of the said Act; all within the establishment or place described as:

(Name of establishment or place) _____
 (Address) _____

-or-

Application having being made and probable cause shown, by (Name of Officer), for inspection
 or sampling of pesticide used in violation of the said Act, at the place described as:

(Name of establishment or place) _____
 (Address) _____

Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, the federal
 regulations promulgated thereunder, and the decisions of Camara v. Municipal Court of the
City and County of San Francisco, 387 U.S. 523 (1967), See v. City of Seattle, 387 U.S. 541 (1967),
 and Marshall v. Barlow's Inc., 436 U.S. 307 (1978) you are authorized to enter (immediately) the

above described premises upon presenting this warrant and therein carry out the inspections, sampling, reproduction of records, and/or issuance or surveillance of any stop sale, use of removal order described above.

(Date)

(Signature of Magistrate)

RETURN OF SERVICE

I hereby certify that a copy of the within warrant was served by presenting a copy of the same to (facility owner of agent) on ___(date)___ at (location of establishment or place).

(Signature of person making service)

(Official title)

RETURN

Inspection of the establishment described in this warrant was completed on ____(date)____.

(Signature of person conducting the inspection)